

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, :
et al., :
 Plaintiffs, :
 vs. : Docket No.: CA 11-1560
AT&T, INC., et al., :
 Defendants. :
----- :
SPRINT NEXTEL :
CORPORATION, :
 Plaintiff, : Docket No.: CA 11-1600
 vs. :
AT&T, INC., et al., :
 Defendants. :
----- :
CELLULAR SOUTH, et al., :
 Plaintiffs, : Docket No.: CA 11-1690
 vs. :
AT&T, INC., et al., :
 Defendants. :
 :
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Washington, D.C.
Friday, 12/09/2011
9:40 a.m.

REPORTER'S OFFICIAL TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE ELLEN S. HUVELLE
UNITED STATES DISTRICT JUDGE

Court Reporter: CHANTAL M. GENEUS, RPR, CRR
Certified Realtime Reporter
Registered Professional Reporter
United States District Court
333 Constitution Avenue, NW
Washington, D.C. 20001

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1 P R O C E E D I N G S

2 (Whereupon, at 9:41 a.m. the proceedings
3 commenced, and the following ensued:)

4 THE COURT: Good morning.

5 ALL: Good morning, Your Honor.

6 THE COURT: Gwen, will you call both cases
7 simultaneously, please, so that all counsel for
8 both -- the Sprint, Cellular South, and the DOJ cases.

9 THE DEPUTY CLERK: So you want Cellular
10 South and DOJ case called first?

11 THE COURT: And Sprint.

12 THE COURTROOM DEPUTY: This is Civil Action
13 11-1600, Sprint Nextel Corporation versus AT&T, et
14 al., Civil Case 11-1690, Cellular South, Inc. et al.
15 versus AT&T, et al., and Civil Case 11-1560, United
16 States of America versus AT&T, et al.

17 I'm going to ask counsel to please come
18 forward and identify yourself for the record and also
19 state who you are representing.

20 MR. WAYLAND: Good morning, Your Honor.
21 Joseph Wayland for the United States.

22 THE COURT: Good morning.

23 MR. WAYLAND: I have with me Mr. Glenn
24 Pomerantz, my co-counsel, and Joe Matelis, my
25 colleague.

1 THE COURT: Good morning.

2 MR. SUNSHINE: Good morning, Your Honor.
3 Steve Sunshine for Sprint Nextel. I also have my
4 colleague, Tara Reinhart with me.

5 MS. REINHART: Good morning.

6 THE COURT: Good morning.

7 MR. CARY: Good morning, Your Honor. George
8 Cary for Deutsche Telekom and T-Mobile. At counsel
9 table I have my colleague, Mark Nelson, Evan Corcoran,
10 and Henry Thumann.

11 THE COURT: I'm sorry. You are not on this
12 list here yet. The list is so long. Again?

13 MR. CARY: George Cary for Deutsche Telekom
14 and T-Mobile with Mark Nelson, Evan Corcoran, and
15 Henry Thumann.

16 THE COURT: All right.

17 I missed Cellular South.

18 MR. McBRIDE: Good morning. I'm Charles
19 McBride on behalf of Cellular South, Inc. Along with
20 me are my colleagues, Alan Perry and Chong Park.

21 THE COURT: Okay, thank you.

22 For ATT.

23 MR. HANSEN: Yes, Your Honor. Good morning.
24 Mark Hansen for AT&T along with my partner, Michael
25 Kellogg and Jim Wade present at counsel table.

1 THE COURT: Okay. Just for clarification,
2 Mr. Hansen, is there any endearments between private
3 suits in terms of representation for ATT?

4 I notice that Mr. Wade has joined at least
5 the two suits brought by Cellular South and Sprint.

6 Is there some division that I should know
7 about?

8 MR. HANSEN: I don't believe so, Your Honor.
9 Mr. Wade and his colleagues have joined as additional
10 counsel. We remain as counsel in the private suit as
11 well as counsel in the government suit.

12 THE COURT: Okay. So you are ready to
13 address both?

14 MR. HANSEN: Yes, Your Honor. I will
15 address the government suit, and my partner,
16 Mr. Kellogg will address the Sprint issue this
17 morning.

18 THE COURT: Okay. Well I think where we
19 need to start, I had originally thought we would be
20 just taking up the initial scheduling involving the
21 two private plaintiffs. But given the events of the
22 recent past, I think that we have to address you
23 first, sir.

24 MR. HANSEN: Sure.

25 THE COURT: In fact, I read the newspapers

1 this morning. They have questions for you.

2 And I asked, through our special master, to
3 find out if there's anything specific that the parties
4 in the DOJ case wanted us to bring up, and I got
5 precious little in response. But apparently the first
6 order of business is the discussion of the FCC
7 proceedings and, second, the discovery update.

8 So I'm happy to have you address those
9 first, since you are more intimately involved in the
10 FCC proceedings than I am.

11 MR. HANSEN: Yes, Your Honor, be happy to do
12 that.

13 There's nothing before the Court. No one is
14 seeking any relief or any change of any scheduling, so
15 I'm not sure what the point of a discussion is. But
16 that's something that the Justice Department wanted to
17 put on the agenda.

18 Here is our perspective on it, Your Honor.
19 While the Justice Department filed its suit with much
20 fanfare and it sought to block our transaction, they
21 have come to court before the special master
22 on repeated occasions, said they --

23 THE COURT: You have to slow down, please.

24 MR. HANSEN: Thank you, Your Honor.

25 -- don't want to try the case, are not ready

1 to try the case, et cetera.

2 Recently, Your Honor, as you read in the
3 newspapers, in the regulatory arena there's --
4 something's happened, but we are continuing to proceed
5 with this transaction. We have --

6 THE COURT: Which transaction? The one --

7 MR. HANSEN: Our merger with T-Mobile.

8 THE COURT: The one that's at issue before
9 me now?

10 MR. HANSEN: Yes, Your Honor.

11 THE COURT: And you do not anticipate that
12 being changed in any way in the foreseeable future?

13 MR. HANSEN: Your Honor, we are sitting here
14 today with the committed transaction with a contract
15 to proceed with the transaction as structured.
16 Nothing has changed with that.

17 I do not have a crystal ball. I do not know
18 what will happen in the future. I don't think anyone
19 can promise what will happen in the future. But I can
20 tell the Court that we have an obligation to proceed
21 with the transaction exactly as it is structured,
22 exactly as it was placed before Your Honor by the
23 Justice Department, exactly --

24 THE COURT: You have an obligation. I'm
25 sorry, where does that come from?

1 MR. HANSEN: We are contractually committed,
2 Your Honor.

3 THE COURT: Now, let's review that for one
4 second so I understand.

5 Somewhere I have read that there is a
6 9/12/12 drop-dead date. Is that correct? What does
7 that mean? What's that date?

8 MR. HANSEN: It's a date by which we have to
9 achieve the closing of the merger or penalties are --
10 not penalties, I guess is the wrong word, but
11 financial consequences ensue.

12 THE COURT: So that if anyone were to walk
13 away -- or if ATT were to walk away from the deal
14 prior to the 12th, the 4 billion penalty, or however
15 you want to call it, is or is not due? What triggers
16 that and when?

17 MR. HANSEN: Well, Your Honor, I think the
18 penalty -- it's not really a penalty. It's a
19 contractual commitment. It's a breakup fee if the
20 transaction is abandoned. I think there would be
21 financial consequences. If the transaction is not
22 closed in a timely way, there would be consequences.

23 So the contract is out there. It hasn't
24 been changed at all. All the reasons why we asked to
25 have the early trial date remain the reasons to have

1 the early trial date. The Court heard all those
2 issues. From our perspective, Your Honor, nothing has
3 changed.

4 THE COURT: Well, something has changed.
5 You have withdrawn that application to the FCC, and we
6 all know that's a condition precedent for this deal to
7 go through. And it seems to be the given that they
8 are not obligated to move particularly quickly, nor am
9 I.

10 I have no -- without a PI, I have no
11 particular obligation to move quickly. You agree,
12 right?

13 MR. HANSEN: Your Honor, I'm not sure
14 "obligation" is the right word. But we think the
15 Court made the right decision last time when you
16 decided, frankly, the government shouldn't be allowed
17 to pocket veto our deal.

18 In other words, if we can't have a trial
19 date in time to obtain the relief, to close the
20 merger, the government, simply by its allegation, will
21 have stopped the merger. And that's not fair or
22 right. We need to have our day in court.

23 As to the FCC, Your Honor, I think it's a
24 very simple story there and in terms of what people's
25 obligations are to do. Obviously, we think the FCC

1 will act just as Your Honor has acted to do the right
2 thing in the right time frame. We have not proceed --

3 THE COURT: But you withdrew your
4 application, so they have nothing to do. You have
5 given them nothing to do at this moment.

6 MR. HANSEN: Your Honor, what we're seeking
7 to do is this: The issues in the antitrust case are
8 framed and ready for trial in this court. The FCC had
9 made an announcement that they were thinking about
10 having a parallel administrative proceeding that will
11 go over many of the same issues. We made what we
12 think is a perfectly appropriate decision to say let's
13 try the case in this court, develop a full record,
14 have the decision of this Court on all of those
15 issues.

16 When that's done, that will dispose of many,
17 if not most, of the issues that would have been before
18 the FCC.

19 THE COURT: Is it collateral estoppel as to
20 the FCC?

21 MR. HANSEN: Yes, Your Honor. It's the same
22 government, absolutely. The government couldn't redo
23 those same issues. The government is litigating these
24 issues against us here.

25 THE COURT: What is your authority for that?

1 First of all, they have a public interest
2 factor that I do not have. You know that, as well as
3 I.

4 MR. HANSEN: Yes. That's why I said many if
5 not most. But we don't think the government could
6 relitigate the competitive issues where they had
7 already been decided in a full and fair proceeding in
8 this court. I think that's standard collateral
9 estoppel law.

10 THE COURT: Well, let's say this: Are any
11 of the findings going to be collateral estoppel as to
12 the private party, or you just say the FCC?

13 MR. HANSEN: Certainly as to us. I mean, in
14 our proceeding, yes, Your Honor. We don't expect we
15 would relitigate before the FCC the competitive
16 findings of this court.

17 THE COURT: How about as to Sprint?

18 MR. HANSEN: They are not a party to our
19 proceeding, Your Honor. Nonmutual offenses of
20 collateral estoppel, I think, is a complicated
21 doctrine. I'm not prepared to address all the
22 different emanations of that.

23 But I think Mr. Sunshine effectively said in
24 the prior proceeding that it expected this Court to
25 have the final word on issues relating to the

1 government's case and it would not seek to be
2 relitigating those.

3 THE COURT: What do you think is a realistic
4 timetable in order to -- if you don't commit to
5 resubmitting to the FCC until this Court rules?

6 MR. HANSEN: Here's our --

7 THE COURT: What is your plan?

8 MR. HANSEN: Here's the plan, Your Honor,
9 and we think it's, frankly, not that much different
10 from the plan we had before, and here's why: We are
11 fully ready, and we will be fully ready to try this
12 case before the Court beginning February 13th. And
13 the Court will have time to decide the issues and make
14 rulings that will be binding on us and on the
15 government. We can go back to the FCC with a full
16 judicial record --

17 THE COURT: If you win. If you win. You've
18 already lost if you lose.

19 MR. HANSEN: Of course, Your Honor. We
20 understand we're in this Court's hands, but we wish to
21 have this Court decide those issues. We're ready to
22 go.

23 When this Court decides those issues we
24 can -- again, I'm not sure of the specific
25 nomenclature, whether it's refiling, some other way to

1 be back at the FCC, but we can be back at the FCC with
2 those issues. Really, we think the predominant issues
3 having been decided, and the FCC will have time to
4 act.

5 THE COURT: How do you get back to them, and
6 when do I have to decide? I find it a little bit
7 unsettling to think that I am being told when I have
8 to decide because you have an agreement that you will
9 lose X amount of money in the billions if I don't
10 decide in a timely fashion. What if you want to
11 appeal? The Court of Appeals is not here in the
12 summer.

13 MR. HANSEN: Your Honor, we had --

14 THE COURT: It's true. I'm sorry.

15 MR. HANSEN: Of course, the Court has many
16 commitments, but we had this discussion before the
17 Court originally. And we gave the Court the
18 timetable, and we tried to set out a timetable that
19 would give the parties the time to try this case and
20 the Court the time to write a decision and, Your
21 Honor, time for any appellate process, obviously an
22 expedited appellate process.

23 THE COURT: But you at that time had pending
24 since, I think, April an FCC application. I'm now --
25 I actually was the Judge who had Echostar. And I'm

1 starting to feel déjà vu that the private parties are
2 saying we have a deadline, you, Judge, are bound by
3 our deadline. You have to give us enough time to get
4 back to the FCC. We would like to have your opinion
5 to help us with the FCC. We've withdrawn our
6 application.

7 That hadn't happened in Echostar. There
8 they were asking me to do it in three and a half
9 weeks. So you are asking us to do it in less. You
10 are asking the taxpayer to support the Department of
11 Justice, basically, in extraordinary expense because
12 we're doubling up, tripling up discovery.

13 You're asking me to tell Sprint and Cellular
14 South to go slow. Their time comes next, where
15 they're not gonna necessarily -- we'll hear from
16 Mr. Sunshine, but they are not going to go away if the
17 government wins -- I mean, they'll go away if the
18 government wins, but they don't necessarily go away if
19 the government loses you just said.

20 So they will -- why don't I want them now to
21 litigate? Why don't I want to slow this down, get it
22 done once and for all?

23 Because when you were here before, you had a
24 much different posture to convince me to move about as
25 humanly fast as possible. But now you have third

1 parties spending enormous amounts of money, legal fees
2 and document review. You have private parties. You
3 have the taxpayer. And you've imposed your client
4 upon the Court to get something done to meet the
5 schedule which you've dramatically altered by removing
6 that petition.

7 Because you have no assurance -- say I am as
8 expeditious as humanly possible and get an opinion
9 out. If it takes six weeks to have a trial, we have a
10 month or two. So you are talking about fast
11 approaching the summer. Do you resubmit your
12 application?

13 What guarantee do you have that you'll get a
14 ruling, one, favorable from me? You have none, we
15 know that. And then what possible idea do you have
16 that the FCC will sign off by the 20th of September
17 and an appeal will be heard, if necessary?

18 MR. HANSEN: Your Honor, with all respect, I
19 don't think anything is any different from when all
20 those considerations were weighed by the Court before.
21 Let me tell you why.

22 The FCC was always contemplated to be behind
23 this Court. We never had a contemplation that the FCC
24 will decide until after the Court decided. And,
25 indeed, these arguments about the FCC were raised with

1 Your Honor and discussed at the time. The fortuity of
2 how we deal with the regulatory process, application
3 pending, not pending doesn't change that calculus.

4 THE COURT: I'm sorry, I have to interrupt.
5 I don't understand that. What I understand, that
6 everybody says the FCC, when you file, can take
7 usually up to six months. That, apparently, is either
8 an unwritten rule or a rule of the agency.

9 So by withdrawing, where are you, if that
10 six months applies? You've now used that up. You
11 can't make that.

12 MR. HANSEN: Your Honor, with all respect, I
13 don't think there's an inflexible six-month rule. I
14 don't think that's right.

15 The FCC has already had proceedings.
16 According to them, Your Honor, they have an open
17 docket respecting this matter. According to them,
18 they have the flexibility to act. We believe -- Your
19 Honor's absolutely --

20 THE COURT: I'm sorry. According to them.
21 From whence are we getting this information? I
22 thought that they had allowed you to withdrew your
23 petition without prejudice?

24 MR. HANSEN: Without prejudice, exactly.
25 They maintained an open docket, according to them.

1 And, Your Honor, we are not aware of any
2 inflexible six-month period. We don't believe that's
3 applicable. We don't believe there is such an
4 inflexible period. We believe that substantively --
5 again, I know the Justice Department wants to make a
6 big deal out of this to keep us from having our trial.

7 THE COURT: No. It seems to me they might
8 not like to have the trial on your timetable. That's
9 what people are concerned about.

10 MR. HANSEN: It's either a trial on our
11 timetable or not a trial at all, frankly. Because if
12 we can't have a trial on an expedited basis, we can't
13 have the merger. Effectively, a pocket veto.

14 Back to the FCC, Your Honor. The fact of
15 the matter is --

16 THE COURT: You are leaving out in that
17 analysis, sir, the FCC.

18 MR. HANSEN: No, Your Honor, I'm fully
19 incorporating the FCC. When we were before you, Your
20 Honor, before -- when we were here before, of course,
21 we talked about the FCC as an independent regulatory
22 actor. They have to make their own decision. The FCC
23 has typically and traditionally been guided by what
24 the court has done in these kinds of issues. We had
25 no commitment as to when the FCC would act.

1 THE COURT: Have you really had experience
2 in that? The only case that I'm aware of that has any
3 similarities is the Echostar matter which clearly fell
4 apart because there was no FCC approval ahead of time.

5 It's a condition precedent to this deal. So
6 to say that my trial in some fashion is the key here
7 and should go first and should be oblivious to the
8 question of whether the FCC will act in time or not --
9 if I had the agreement of the FCC that we all could
10 get done in time, it makes it a lot more productive.

11 The way I'm looking at this, I don't think
12 there may be a case in controversy issue as suggested.
13 But I certainly see that the landscape has changed,
14 sir. It has clearly changed.

15 I have no assurance that you're gonna
16 proceed with the FCC in any way to get this resolved
17 in a timely manner. So to ask me to issue an opinion
18 with enough time to allow for an appeal for the FCC,
19 which we don't know what their timetable is -- you've
20 had no discussion, I'm sure, or assurances from them,
21 I suspect, unless you want to tell me otherwise. If I
22 had assurances, I might be willing.

23 I can get the work done, but you're not
24 actually giving me much reason why. I gave you the
25 early trial date over their objection. I now have

1 another lawsuit, which we didn't know about at the
2 time, who would just as be happy as consolidating.
3 And we slow it up slightly, and they'll be involved,
4 and I'll have two trials -- I'll have one trial
5 instead of two. Obviously preferable from everybody's
6 point of view, and I can still get done before
7 September 20.

8 But it's a bit presumptuous to say nothing
9 has changed and you should just keep doing what we
10 convinced you to do over the objection of certainly
11 the Department of Justice without me knowing for sure
12 that the deal will be the deal.

13 I mean, you could change the deal in a month
14 and everybody's time will be wasted, including the
15 third party. I mean, we have hundreds of nonparties
16 out there looking for documents.

17 I didn't find the motion by LightSquared to
18 be frivolous. I can understand why they said it. I'm
19 saying the same thing they are and that the magistrate
20 judge -- the special master indicated.

21 We don't have any confidence that we are
22 spending the time and effort and the taxpayers' money
23 as well as the money of these other parties, we have
24 no confidence that we're not being spun.

25 So let me hear from the government for a

1 minute.

2 MR. HANSEN: Can I just address that, Your
3 Honor?

4 THE COURT: Yeah.

5 MR. HANSEN: I really do want to stress one
6 point. The only thing we're talking about different
7 here is whether an application is pending or not
8 pending. We are still committed to be at the FCC. We
9 never had any commitment before as to when the FCC
10 would act. The exact filing status is not
11 determinative of what the FCC will do.

12 With all respect, Your Honor, I understand
13 Your Honor's concerns, but from the perspective of
14 having a committed transaction with contractually-set
15 dates, we've all gated our expectations. We are
16 moving forward with trial. We're making progress, and
17 it will be of assistance to the FCC to have a decided
18 case on the antitrust issues. It just will.

19 And it will put us in a position --

20 THE COURT: Nobody there said that to me.
21 Have they said that to you?

22 MR. HANSEN: Pardon me, Your Honor?

23 THE COURT: I said has anyone said that to
24 you? Honestly. I mean, you think it will if you win,
25 but --

1 MR. HANSEN: Many people have that said to
2 me.

3 THE COURT: From the FCC?

4 MR. HANSEN: I have not spoken to the FCC,
5 Your Honor. But, truthfully, it only makes sense that
6 if this Court has decided the antitrust issues, the
7 same government will be bound by those decisions as to
8 the antitrust issues. There just doesn't seem to
9 be -- I don't think that's a live issue.

10 THE COURT: You said in a letter to counsel
11 from LightSquared -- I don't remember whether it was
12 you or Mr. Wade -- defendants intend to seek the
13 necessary approval from the FCC as soon as practicable
14 -- or practical, sorry -- and that my decision could
15 constitute a materially changed circumstance.

16 So I read that to say that until you have a
17 decision from this Court -- and I am certainly not
18 bound to issue one on a day certain -- that you won't
19 seek approval. Is that what you mean by "as
20 practical"?

21 MR. HANSEN: I think all options are still
22 available, Your Honor. We are proceeding with the
23 regulatory process and what we think is the
24 appropriate way.

25 THE COURT: What is that, sir?

1 MR. HANSEN: It means how we can most
2 effectively get it done. Obviously, we think it would
3 be of assistance to have that -- this Court's decision
4 before the FCC. Exactly how and when you would do
5 things at the FCC, I can't say. I'm not -- I just
6 don't know.

7 THE COURT: Is that sentence, "Defendant's
8 intend to seek the necessary approval as soon as
9 practical" sensible? Does it mean anything?

10 MR. HANSEN: Yes, Your Honor. It means that
11 we are committed to concluding this transaction.
12 Whether we do that next week or six months from now is
13 really a function of how we best get that done.

14 We have always told this Court there were
15 two independent things we had to get done to complete
16 this transaction: Getting the Department of Justice's
17 lawsuit resolved and getting the FCC approval.

18 We decided, Your Honor, for what we think
19 are sensible reasons, that rather than have an FCC
20 hearing process in parallel to this Court's trial --
21 which is what we were facing -- it made sense not to
22 have that, but rather to have those issues decided in
23 one place, and that was in this court where we already
24 have a schedule to get them tried in February rather
25 than have them tried here and in front of an

1 administrative law judge somewhere else. That's the
2 only thing that has happened.

3 When we have this result, we don't think we
4 will have that other process. That process will be
5 effectively short circuited because this Court will
6 decide many, if not most -- I didn't say all, but
7 many, if not most, of the important issues. And then
8 we'll have our fair chance before the FCC.

9 We understand the FCC isn't obligated to
10 approve our transaction. We understand that the FCC
11 has its right to take whatever time the law gives it.
12 But we think the FCC, just like this Court, will be
13 sensitive to the fact that we have a transaction.
14 It's important for the future of a lot of people and a
15 lot of companies, and we'd like to have a chance to
16 have it resolved on the merits.

17 What the government is telling, Your
18 Honor -- I understand Your Honor's skepticism, but
19 what the government is telling you and the delay
20 argument is effectively, well, just sit and wait and
21 maybe this will all go away.

22 THE COURT: What happens if they withdraw
23 their complaint?

24 MR. HANSEN: If they withdraw their
25 complaint with prejudice, we don't have to have a

1 proceeding in this trial, Your Honor.

2 THE COURT: They won't.

3 MR. HANSEN: Of course, they won't do that.

4 THE COURT: But, sir, you know, we could be
5 here on a PI and probably save everybody a lot of
6 headaches.

7 MR. HANSEN: But, analytically, Your Honor,
8 I think you've put your finger on exactly the right
9 question. It's the fundamental fairness point that I
10 really think is the counter way to the practical
11 concerns.

12 If they were here saying yes, we'll drop it
13 with prejudice --

14 THE COURT: No, not with prejudice, because
15 they don't -- at this moment they don't see that
16 you're a serious proponent of this deal without an
17 application pending in the FCC.

18 MR. HANSEN: If they believe that, they
19 could drop it with prejudice. They don't believe
20 that. They want to preserve the -- and, Your Honor, I
21 recognize the skepticism, but think of the practical
22 effect here. By having their complaint out there and
23 unresolved, they are having a pocket veto over our
24 deal.

25 In other words, if this trial gets pushed

1 back, if all the things get pushed back, we don't make
2 thresholds, deal has to blow up. We have no
3 alternative. Yet the government has never proved a
4 single thing in court.

5 THE COURT: Your problem is also self-made
6 with the FCC.

7 MR. HANSEN: No, Your Honor, we don't think
8 it's self-made because we have to get this trial done.

9 Forget about the FCC for a minute.

10 THE COURT: That's what you may have done.
11 I'm not doing that. I'm sorry.

12 MR. HANSEN: Both things have to get done,
13 and we have ways to deal with both of them. For this
14 Court to essentially say we can't have our day in
15 court here --

16 THE COURT: I didn't say that.

17 MR. HANSEN: If we don't have our day in
18 court -- we had these discussions before with Your
19 Honor, and the day in court that is meaningful to us,
20 obviously, has to be an expedited day in court.

21 The FCC is, itself, a hurdle we have to get
22 over, and we have a way to get over that hurdle.
23 Simply for them to say, well, just because we now
24 think you are doing it differently with the FCC, don't
25 have the trial on the issues that we've framed and set

1 a block and gave reasons for the deal, we think that's
2 unfair to us. We think all these issues are still
3 live issues.

4 Until such time as they tell us they are not
5 challenging our deal, we need to get those issues
6 clear, and we need to move with the FCC as well. But
7 the fact that we have chosen not to have parallel
8 proceedings but rather have chosen as a matter of --
9 pardon me. To essentially get those issues resolved
10 here and use that --

11 THE COURT: Yeah, use it. I understand
12 that.

13 MR. HANSEN: -- with the FCC, but to have
14 this Court's guidance. And we think with this
15 Court's --

16 THE COURT: You could have the FCC's
17 guidance because they have a broader jurisdiction than
18 this court. And they could go first, and it would
19 certainly be very persuasive, if not, according to
20 you, collateral estoppel because it's the government.

21 So if you wanted the FCC, you win the whole
22 nine yards, whereas here you don't make nine yards no
23 matter what. I'm just one person along the way that
24 you would like to have a decision to use. I agree.

25 MR. HANSEN: Not to use, to have our day in

1 court.

2 And as to Your Honor's point about the FCC,
3 we don't have that as an option, and I'll tell you
4 why.

5 We already had a full expedited trial
6 schedule to get these issues decided by Your Honor at
7 the time the FCC staff indicated they wanted to have
8 an administrative hearing. We have no guarantee in
9 that process we would have an expedited administrative
10 hearing. We have, on the other hand, an expedited
11 trial in this court.

12 THE COURT: You have no guarantee of that.

13 MR. HANSEN: Well, we had an order from the
14 court saying this is what was gonna happen.

15 THE COURT: Well, now I have two private
16 litigants sitting here, too, that you would like to
17 have them wait until after the deal goes through in
18 September. You want -- you know, you want one chance
19 at one judge, then to take it to the FCC. You don't
20 want Sprint to be involved in this or Cellular South
21 at this time because they'll slow us down. And then
22 you say to them, well, we'll have a trial afterward.
23 But they're not bound.

24 So you say to the judge, well,
25 hypothetically, you could have two trials, Judge, but

1 that's okay for you because we will have a shot of
2 having -- a fifty/fifty shot of taking your decision
3 to the FCC.

4 It's a rather presumptuous position you find
5 yourself in to say -- skeptical isn't the only word
6 that might apply.

7 MR. HANSEN: Your Honor, we're trying to
8 simply have an appropriate chance to have these issues
9 litigated on the merits.

10 You are absolutely right. To inject private
11 parties into this government lawsuit makes it
12 difficult, if not impossible, for us to have our day
13 in court on the merits.

14 And, Your Honor --

15 THE COURT: Why impossible? Wait. Wait.
16 Let me hear what the impossibility is. It just means
17 you have to fight more than one petition.

18 MR. HANSEN: Well, we had these very
19 disputes before Your Honor, I think, the last two
20 times we were before the Court when we laid out all
21 those arguments. I believe we were persuasive at that
22 time persuading the Court that injecting private
23 parties with private competitors' concerns in the
24 government's lawsuit made it an unadministrable
25 lawsuit. And that was our basis for making those

1 arguments then, and we think they are every bit as
2 valid now.

3 THE COURT: Can I interrupt for one thing so
4 maybe I clarify it?

5 I believe that you are flatly wrong on the
6 law that they have to show a Section 7 as well, and
7 they will not be bound by the government, probably,
8 under collateral estoppel basis and, therefore, at
9 least up to the point of standing, there is one -- I
10 am quite -- sort of shocked by your pleadings.
11 There's never been a suggestion by this Court, and I
12 don't know whether there's ever been one by the
13 Department of Justice, but their burden is the same as
14 the government's up to a point, plus some.

15 So it's that part that I don't want to try
16 twice if you were to prevail. I mean, if the
17 government prevails, we don't have to worry about
18 Sprint.

19 But that -- so to the extent that you are
20 proceeding on a premise that they need not show a
21 Section 7 violation to even then get to the next step
22 of standing, I cannot find a bit of support for that,
23 and I find lots of support to the contrary. And if
24 that's the case, now that we have two -- their
25 discovery is not gonna be quite so limited. And I'm

1 not looking favorably upon the idea of looking at the
2 issue twice.

3 MR. HANSEN: Your Honor, I believe
4 Mr. Sunshine told the Court early on we weren't going
5 to look at the issue twice. Whatever the government
6 had will be decided in the government's case. They
7 had other claims that will --

8 THE COURT: I think Mr. Sunshine probably
9 wants to say something different today.

10 I'd like to go back to the issue of why we
11 picked the trial date when we did.

12 My understanding was that you were proposing
13 to close in March. You've now moved the goalpost,
14 clearly. You were here telling us that your date --
15 and then you had the petition pending. It had been
16 out there more than six -- would be more than six
17 months at the time, and that we were aiming to get
18 done by March.

19 MR. HANSEN: Your Honor, I don't believe
20 we've moved the goalpost at all. I believe we told
21 the Court exactly accurately what the gating dates
22 were in the contract, and they are still the gating
23 dates. We have a March date. We have a September
24 date. I think I specifically raised with the Court
25 just those dates.

1 THE COURT: March, September, and there's
2 something in June.

3 MR. HANSEN: Yes, exactly, Your Honor. The
4 dates are as we previously represented. Nothing has
5 changed. We still have those dates. But, obviously,
6 it seems unlikely we are going to close in March. We
7 have the September date we're facing.

8 THE COURT: What's the June date? Somebody
9 has to certify?

10 MR. HANSEN: Certify the possibility that we
11 will be able to proceed with the transaction.

12 THE COURT: Is that the -- "possibility" is
13 the language?

14 MR. HANSEN: Reasonably, likely. I don't
15 have the exact -- someone has to certify they believe
16 it's a reasonable chance that we can -- we can
17 successfully conclude. But those dates are exactly as
18 previously represented, Your Honor.

19 THE COURT: Well, I'm curious -- and I don't
20 have this agreement. I actually would like to see it
21 because I think the difference, especially for
22 purposes of a public company, is somewhat important.
23 It's reasonable -- what is it, again, somebody from
24 your company would have to certify?

25 MR. HANSEN: I think --

1 THE COURT: Reasonable chance? No, that
2 can't be.

3 MR. WAYLAND: Your Honor, reasonably
4 possible.

5 THE COURT: Reasonably what --

6 MR. WAYLAND: Meaningfully possible to occur
7 prior to such extended date.

8 MR. HANSEN: Meaningfully possible to occur.

9 THE COURT: And so without my decision, you
10 as attorneys for ATT think that you can certify that
11 without -- if I haven't complied with that date? You
12 don't think that's an important date for your
13 purposes?

14 MR. HANSEN: June is certainly an important
15 date for our purposes. I think the dates are as I
16 previously represented, Your Honor. Nothing has
17 changed on that.

18 THE COURT: You keep on forgetting the FCC.

19 MR. HANSEN: Your Honor, all that's happened
20 with the FCC --

21 THE COURT: I know. I know what's happened.

22 MR. HANSEN: -- is strategy for how to gain
23 approval.

24 THE COURT: I know. But don't you
25 understand from those of us who are not one of the

1 parties, that this "strategy" has a slight aura of
2 using -- I think is the word that you used -- the
3 Court to some extent, and the third parties and the
4 Justice Department?

5 I understand they're in the driver's seat.
6 So for them to not ask for any relief sort of
7 surprises me, because they are working as hard as you
8 are, if not more so. But I have some responsibility
9 to the taxpayer to worry about whether we're entering
10 into an exercise in which we are being used in a way
11 that were not intended; "we," the courts.

12 MR. HANSEN: Your Honor, let me be very
13 direct about that, Your Honor. We didn't seek resort
14 to the court. We were sued.

15 THE COURT: Right.

16 MR. HANSEN: We were sued by a government
17 that said we are going to block your \$39 billion
18 transaction, which is a big thing for us, our
19 shareholders, lots of other people. The Court's aware
20 of that.

21 THE COURT: Sure.

22 MR. HANSEN: Our only recourse is to come to
23 this Court to say we need to have the Court either
24 decide, or we lose the transaction. There's a pocket
25 veto aspect to this.

1 We don't believe that's using the Court. We
2 simply believe that's an appropriate thing to bring to
3 the Court's attention.

4 THE COURT: Why don't you renegotiate if
5 it's such a good deal?

6 I mean, really, that's what happened in
7 Echostar. They came and said we picked a date of
8 January. By the way, Judge, you are just going to
9 have to help us do this.

10 I find that difficult. You have a right to
11 negotiate with private parties if it's such a great
12 deal. Don't say everybody else has to comply with
13 your timetable. To comply with your timetable is
14 taking us a great deal of not -- I'm not speaking on
15 my behalf. I'm talking about the larger group of
16 people, far larger group. It's an enormous burden.

17 MR. HANSEN: Your Honor, the burden is
18 imposed on us by the Justice Department, who got the
19 transaction in March, decided to sue to us August 31
20 and put us in the position we're in.

21 The fact is, Your Honor, we're not trying to
22 impose a burden. We are simply trying to comply with
23 our contractual obligation.

24 You say we can renegotiate the deal. That's
25 absolutely -- we could make a deal. Who knows what

1 could happen. I don't have a crystal ball.

2 Here's what I have today, Your Honor. And I
3 really apologize. I don't mean to be presumptuous,
4 but I do mean to be as direct as I can. We are put in
5 a position by people other than us. This is not a
6 creation of ours. We were put in a position by the
7 Justice Department of defending the lawsuit.

8 We then had the FCC say, you know what, why
9 don't we have our own proceeding? We said to that,
10 you know what, it makes no sense to have parallel
11 proceedings. We think if we have a proceeding in this
12 court -- which we have planned, which the parties are
13 working to conclude before this court in February, so
14 the court can decide the issues, that will be in the
15 best interest of everyone.

16 THE COURT: Did they agree?

17 MR. HANSEN: Did who agree?

18 THE COURT: The FCC.

19 MR. HANSEN: They agreed to allow us to take
20 the step we took.

21 THE COURT: But they agreed to let you
22 withdraw your petition?

23 MR. HANSEN: Yes, Your Honor.

24 THE COURT: Was it without prejudice they
25 agreed?

1 MR. HANSEN: They did agree to that.

2 THE COURT: They haven't agreed to anything
3 else. I regret for everybody there's these two
4 parallel tracks, but without one even being -- the
5 train even being on the track at this moment gives one
6 some insecurities.

7 MR. HANSEN: Let me just pause on that, Your
8 Honor. In substantive terms -- and I recognize the
9 Court's points, but in substantive terms we're still
10 where we were.

11 Now we need to have the FCC approve this.
12 We have already had significant proceedings at the
13 FCC. They have lots of information.

14 THE COURT: They didn't like the
15 information. No, I don't mean to be facetious. I
16 mean, you're looking at the possibility that I agree
17 that you have many arguments for the staff report, but
18 I suspect without knowing that you have full access to
19 a report that was fairly negative, sir.

20 So we are not in the same place. You have
21 to look at the other regulatory process with a good
22 deal of caution at this point, that their concerns are
23 not limited to Section 7, and they are not favorable
24 to you.

25 And even if you had a full fight and a full

1 opportunity to address that report -- and whether it
2 ever comes in in this case, I have no idea. It's
3 another big issue along with twenty-seven others, but
4 your posture is just not the same as it was.

5 MR. HANSEN: Your Honor, with all respect,
6 the staff report has no more significance than the
7 DOJ's complaint. It is a government, essentially,
8 prosecutorial document. It's entitled to no weight.
9 And, indeed, much of it is about the antitrust issues
10 that will be resolved in this court.

11 THE COURT: But not all.

12 MR. HANSEN: Not all, Your Honor. We think,
13 we honestly think that when the government is forced
14 to finally prove their case in this court and we can
15 show that they're wrong, a lot of the staff report
16 goes away, too. It's a deeply flawed document, deeply
17 flawed analysis; entitled to no deference.

18 And the FCC has not acted. There hasn't
19 been a single FCC action in terms of what will happen
20 with this transaction. They have not --

21 THE COURT: Of course. You withdrew. They
22 let you withdraw. I mean, you're sort of compressing
23 the chronology. The report is starting to percolate.
24 After you withdraw, they say it's okay and they make
25 it public, and you respond.

1 MR. HANSEN: Right.

2 THE COURT: But those events that occurred
3 over the Thanksgiving are not the same as where we
4 were when we were here setting a trial date.

5 I guess I should hear from the government.
6 They brought this complaint. They have concerns about
7 it, they better let me know.

8 MR. HANSEN: Well, I'm sure, Your Honor.
9 But if they want to drop the complaint, that's one
10 thing, but we simply think they can't have it hanging
11 over us. If they drop it, they drop it with
12 prejudice.

13 We are committed contractually to going
14 forward. And we do honestly believe that all the
15 considerations the Court has identified are
16 essentially the same considerations as when we went
17 into setting the trial date in the first place. And
18 we are where we were, and it would be unfair to us to
19 let the government effectively exercise a pocket veto
20 of our transaction by means of a lawsuit.

21 THE COURT: It's not a pocket veto. Don't
22 forget, they have one other entity with a veto power
23 and you have a private suit out there. It's hard not
24 to think of these.

25 MR. HANSEN: The private parties, if they

1 really wish to come in, jump the queue of all the
2 other private litigants at the doors of this
3 courthouse, they can seek a TRO. They can seek a
4 preliminary injunction. I don't see how private
5 litigants get to essentially jump the line because
6 they say we want to jump the line.

7 THE COURT: We just told them how.

8 MR. HANSEN: Well, they don't want to do
9 that because it's unlikely they'll prevail. But the
10 situation is, Your Honor, private parties, you know,
11 obviously, you know, they have whatever rights they
12 have.

13 But we have a pending lawsuit, a pending
14 schedule, lots of water under the bridge. People are
15 working very, very hard. I was -- U got back at 2 in
16 the morning after having been at a deposition in
17 Dallas yesterday.

18 Your Honor, we are committed to making this
19 schedule and being in court in February so that we can
20 have the transaction addressed on the merits and not
21 on predictions about what an FCC will do when they
22 haven't even gotten the transaction in front of them.

23 Nobody has done anything at the FCC yet.
24 The staff report is no different than the DOJ decided,
25 you know, the prosecutorial filing.

1 The merits of this transaction are positive.
2 They are beneficial. If we can't convince the Court
3 of this, then we don't win. We understand. If we
4 can't -- think of that world. Think of a world where
5 we can convince Your Honor in February or March this
6 is a pro-competitive transaction and all their
7 theories are at war with the facts --

8 THE COURT: Then they'll want to appeal.

9 MR. HANSEN: They'll have a right to appeal,
10 and they can expedite the appeal.

11 Think of the world in which those are the
12 facts. We then have a material chance --

13 THE COURT: How can they appeal if I don't
14 decide before June? Really.

15 MR. HANSEN: They can expedite the appeal
16 for whatever time Your Honor has decided.
17 Obviously -- we will look at the world in June the way
18 the world looks. If we have a decision from Your
19 Honor saying we think you, AT&T, are right, much
20 easier to certify on the standards that you adduce.

21 The government, on the other hand, if they
22 have a decision by June adverse to them, they can say
23 to the D.C. Circuit, we need some kind of ruling up or
24 down in time to block the deal before this closes in
25 September.

1 The FCC can act very quickly when it wishes
2 it. It can act very slowly when it wishes to. But we
3 are going to take the, hopefully not naive, assumption
4 that the commission at the FCC wants to do what's in
5 the public interest and take this case on the merits
6 and not do some sort of cynical thing like a pocket
7 veto.

8 We could only assume that everybody who has
9 a role to play in this process is going to act in such
10 a way as to decide this case on the merits and not on
11 a pocket veto basis. And the only way we can avoid a
12 pocket veto, Your Honor, it really is -- and we don't
13 mean to be presumptuous. We are not using the Court,
14 and we're not playing some strategic game. The only
15 way we can have this case decided on the merits is to
16 have a prompt trial in this court on what the DOJ has
17 alleged --

18 THE COURT: And a prompt decision.

19 MR. HANSEN: Your Honor, we apologize. We
20 know it puts a burden on the Court; puts a burden on
21 everybody. We didn't sue to block the deal. They
22 sued to block the deal.

23 We are going to meet every deadline. We're
24 certainly working very hard, as everybody, on this.
25 We understand it places a burden on the Court, and we

1 apologize for that.

2 THE COURT: Not just the Court.

3 MR. HANSEN: But it's essentially by virtue
4 of the Justice Department coming in and seeking to
5 block a very substantial private transaction. And if
6 they're right, wonderful. That's the way it has to
7 be. But if they are wrong, Your Honor, if they are
8 wrong, it should be decided on the merits. It
9 shouldn't be decided based on them never having to
10 prove their case and scuttling this deal.

11 Echostar, Your Honor, you were involved in
12 that. I wasn't. But the distinct flavor of that one
13 was on the deal going away. People just had to go
14 away. They never really got to resolve that on the
15 merits.

16 THE COURT: I never did it based on smell.
17 I mean, really. They came in and asked for something
18 that was almost undoable. And I'm not sure whether
19 this is or isn't.

20 Which brings me to the second issue on your
21 agenda before I turn to the government and
22 Mr. Sunshine.

23 You said discovery update was one of the
24 issues. I just want to know what that refers to in
25 the agenda.

1 MR. HANSEN: Your Honor, that's the
2 Justice's agenda, not ours. We are, actually, quite
3 pleased with the progress of discovery, thanks to the
4 intercession on a timely basis of Special Master
5 Levie. My understanding is there is no -- I want to
6 underline this, there is no unresolved discovery.

7 THE COURT: Is there something coming up
8 with the company in Texas that we need to know about?

9 MR. HANSEN: Yes, Your Honor. MetroCell,
10 they sought to quash in Texas. I haven't read it, but
11 I believe there's an order referring that to Master
12 Levie by the court in Dallas, which we welcome. I
13 think remarkably Special Master Levie has, within a
14 day or so of virtually every dispute being brought to
15 him, promptly resolved it.

16 So we sit in a situation where I think
17 everybody contemplated going in that there could be a
18 myriad of discovery disputes. We're moving forward
19 quite efficiently from our perspective.

20 THE COURT: Have you reached all these
21 deadlines that have been set up? We are up at seven
22 rebuttal expert identifications due.

23 MR. HANSEN: We've made every deadline, Your
24 Honor.

25 THE COURT: Twelve fact witnesses identified

1 by plaintiff. After the eighteen, eighteen by you.
2 That's all moving along?

3 MR. HANSEN: All correct, Your Honor. Every
4 deadline been met.

5 THE COURT: How many more third-party
6 depositions are there to go?

7 MR. HANSEN: I think there are a number,
8 Your Honor; five or ten. There's a substantial
9 number.

10 THE COURT: Total five or ten?

11 MR. HANSEN: At least from us.

12 THE COURT: They haven't been set yet, you
13 mean?

14 MR. HANSEN: I think most of them have been
15 set or we are in negotiations to get them finally set.
16 People are being cooperative, for the most part.

17 Again, the safety valve is to the extent
18 somebody is not cooperative, we'll take the matter to
19 Special Master Levie. And that's been very effective
20 in getting it worked out, as you saw in LightSquared.

21 THE COURT: Do you know what the basis of
22 this motion to quash is?

23 MR. HANSEN: Of MetroCell's? Your Honor, I
24 don't specifically know the details of that. I
25 suspect it's beyond confidential information...I can't

1 address the Court on the specifics.

2 THE COURT: We've now agreed, for the
3 record, that we will have the tutorial on the industry
4 the 18th and 19th. And I've set the contours through
5 the special master. We will have more of a discussion
6 than a cross-examination. And you will -- I think
7 we've set a timetable where the parties will give me
8 the agenda and what topics they want, who will take
9 the burden for which topics so we cover the things
10 that are essential for me to understand the industry.

11 I also appreciate the parties having -- I
12 had to continue this matter because of family illness,
13 but -- that was the reason. It had nothing to do with
14 the contours of this deal.

15 All right. I think we need to hear from the
16 government.

17 MR. HANSEN: Thank you, Your Honor.

18 MR. CARY: Your Honor, before you hear from
19 the government, can T-Mobile be heard on this point
20 briefly?

21 THE COURT: Sure. Sure.

22 MR. CARY: Your Honor, I'm not going to
23 repeat what's already been said, but very briefly, it
24 has always been our contemplation that the FCC
25 decision would come after the decision in this court.

1 That's our understanding of what the FCC's plan is as
2 well.

3 So the only thing that we're talking about
4 here is whether they can decide that quickly.

5 We understand that there are --

6 THE COURT: Let me stop you. The FCC was
7 willing to wait, by the way, for an ALJ to do their
8 work. So that -- nothing about that has changed
9 except now they don't have an ALJ getting ready to do
10 anything because you withdrew.

11 MR. CARY: Yes. And that is exactly the
12 point. That is exactly the point, Your Honor.

13 The FCC has never done a merger trial
14 through an ALJ. That's a very long process. It's
15 usually done at the staff level where things are
16 worked out. When they announce that there was a
17 possibility that they would put it into an ALJ
18 proceeding, that's why the hearing -- the application
19 was withdrawn.

20 THE COURT: Why?

21 MR. CARY: But the notion here is --

22 THE COURT: They've never done it before?

23 MR. CARY: Sorry?

24 THE COURT: It's because they've never done
25 it before?

1 MR. CARY: Because the timeline of that kind
2 of a proceeding would have been so long it would have
3 pushed us beyond the drop-dead date of the deal.

4 THE COURT: How do you know that? I just
5 don't know how you know that.

6 MR. CARY: That is the practice in terms of
7 an ALJ proceeding. They said they wouldn't start it
8 until after the trial, and the process takes a long
9 time. So that was effectively the equivalent of
10 pushing it past our drop-dead date.

11 When the government brought this case, they
12 made a point of saying that it was important to
13 expedite because T-Mobile's business was in limbo
14 during this process. It remains in limbo.

15 The only way this deal can get done is for
16 this Court to go ahead expeditiously, and then for the
17 FCC process to get done.

18 It's --

19 THE COURT: How does that latter process get
20 done? I just don't understand it.

21 MR. CARY: Because after this adjudication
22 is finished, we go back to the FCC and we finish the
23 process there outside the context of an ALJ
24 proceeding, and that can be done.

25 THE COURT: But, again, you are being

1 presumptuous. You are saying the FCC will do what you
2 want.

3 You're assuming you win here, that I do a
4 very quick job in response to a long, complicated
5 case, get you an opinion. If you then win, then you
6 go to the FCC, and they'll no longer care about an
7 ALJ, they'll no longer care about other issues, and
8 they'll beat your deadline. And if the government
9 wants to appeal, the Court of Appeals will beat your
10 deadline, and fine and dandy you might get through by
11 the 20th. The number of ifs in that scenario is
12 mind-boggling to me.

13 MR. CARY: There are many ifs in that
14 scenario.

15 THE COURT: It is a responsible thing for
16 your parties to be doing this?

17 MR. CARY: Where there's no if, is that if
18 this trial doesn't occur expeditiously, then the
19 transaction's over.

20 THE COURT: Yeah. There's one last --
21 there's one if instead of many, many ifs.

22 MR. CARY: Right. So the only way this
23 transaction can get done is if this case proceeds
24 expeditiously, and if the FCC then takes the record
25 and deals with it expeditiously.

1 THE COURT: And the Court of Appeals doesn't
2 have anything to say before the 20th, or no one
3 appeals.

4 MR. CARY: That's right.

5 THE COURT: And that -- those are three ifs.

6 MR. CARY: That's right. But a decision by
7 this Court to put off the trial is a decision --

8 THE COURT: I can put it off a month or two
9 and get you a decision before the end of the summer,
10 but you would not like that.

11 I can beat the 9/20 date in no time at all,
12 but I can assure myself not having to look at the
13 private parties again -- I would like to see
14 collateral estoppel work both ways here; not just you
15 going to the government, but me not having to deal
16 with private parties.

17 MR. CARY: But under that scenario there is
18 no plan. There is no way to get it through the FCC in
19 time.

20 THE COURT: I don't know what would -- how
21 that will happen one way or the other no matter what I
22 do. You don't either, right? I mean, frankly.

23 MR. CARY: No, we do. We do. There is a
24 prospect -- if this case is completed, if there's a
25 record that deals with the competitive issues, there

1 is no need for a separate adjudication of the FCC.
2 The FCC could very well recognize that and resolve the
3 remaining issues. There's plenty of time for that to
4 happen outside the context of an adjudication.

5 But if this case doesn't go ahead, then the
6 deal's over. It's the equivalent of having
7 permanently enjoined the transactions.

8 THE COURT: Well, this case can go forward,
9 but it doesn't have to go forward in a month. I mean,
10 there's a variety of issues.

11 MR. CARY: But all the reasons that
12 militated in favor of an early trial date. In fact,
13 the Department of Justice originally proposed a March
14 trial date a couple of weeks later than what is
15 scheduled. All of those reasons remain. T-Mobile
16 remains in limbo. The transaction remains in limbo.
17 The FCC process is held up because it was always going
18 to come next, after this transaction -- after this
19 hearing. All of that remains as it was.

20 THE COURT: Limbo at FCC is a result of
21 their reaction to your deal. It has nothing to do
22 with me.

23 MR. CARY: That's correct.

24 THE COURT: I mean, you would just like to
25 be able to say that one court has considered the

1 arguments of Section 7, but they -- I don't know
2 exactly what the collateral estoppel effect is. Maybe
3 Mr. Wayland has a point of view, or Mr. Sunshine, on
4 that. I've never thought about it, but still I'm sure
5 some of their issues have nothing to do with Section
6 7.

7 MR. CARY: The staff has indicated they have
8 a lot of issues. Most of those issues are Section 7,
9 and the commission would benefit from a full
10 adjudicated record, and at that point there would be
11 no necessity of doing another.

12 THE COURT: Whose opinion they would
13 benefit?

14 MR. CARY: That's my opinion.

15 THE COURT: I would like to hear from the
16 FCC, but they are not here.

17 Okay. Let us hear from the other parties on
18 this.

19 MR. CARY: Yes.

20 MR. WAYLAND: Good morning, Your Honor.
21 There's a fundamental fallacy in what the Defendants
22 are telling you, and that is that they believe that
23 they can invoke the jurisdiction of Clayton Act
24 Section 7 and get Your Honor to issue an opinion
25 because they want to get going fast.

1 But the way Section 7 works, it's a blocking
2 statute. We use it to block transactions when we
3 think they're going to close. When we filed our
4 complaint in August, there was an FCC proceeding in
5 place already. There was a calendar at -- the 180-day
6 clock was running.

7 THE COURT: Yeah. And they filed in April.

8 MR. WAYLAND: In April. So we filed in
9 August thinking that we needed to do so because the
10 FCC might complete its process, and we needed to be
11 ready.

12 And that's what Section 7 does. It gives us
13 a right to block. We don't have to approve. The
14 court doesn't have to approve. It's simply a blocking
15 statute. We invoke it when we think we need to stop a
16 transaction.

17 Right now, Your Honor, there's absolutely no
18 reason to invoke it because this transaction cannot
19 close, and they cannot get it closed until they file
20 with the FCC.

21 So we're next -- the reason for the delay,
22 we raised this issue with the special master the other
23 day, and we've been waiting to see what the response
24 would be in front of Your Honor, which is why we put
25 it on the agenda.

1 We thought maybe they would come in and say,
2 okay, we're gonna file with the FCC next week and
3 nothing's really changed. But hearing what we've
4 heard today, which is that they may not file until
5 after Your Honor rules or some other time, there's
6 just no basis at all to understand when they are going
7 to file, we next week will file a motion. The motion
8 will be this: It will be either a motion to withdraw
9 without prejudice, or a motion to stay the
10 proceedings. We are to make that filing next week for
11 all the reasons that Your Honor has already suggested.

12 THE COURT: Let's get specific here. It
13 saves a lot of time and effort if we know what we are
14 doing. I don't know why it takes so long to figure it
15 out.

16 I just -- I think that they have to come to
17 some grips with this in order for everybody to feel as
18 though we're operating on --

19 MR. WAYLAND: Exactly right, Your Honor.

20 THE COURT: We are going to have to hear
21 this quickly; quickly. You are going out doing
22 discovery, and we are not putting a halt on that
23 discovery at the moment.

24 MR. WAYLAND: We can file our motion on
25 Tuesday, Your Honor.

1 THE COURT: And they have till Thursday and
2 we'll be back on Friday. You are going to either move
3 to stay or dismiss without prejudice under 42?

4 MR. WAYLAND: Correct, Your Honor.

5 THE COURT: You know, I've been in this
6 situation. It's not great, and no one loves it, but
7 if we had to have a PI, we'd have to have a PI that
8 exists out there. It's not the ideal way to go.

9 But you must know a lot by now. I mean, I
10 don't know how much --

11 MR. WAYLAND: Well, actually, there's a
12 substantial amount of discovery to be done. I can
13 give it to Your Honor if Your Honor is interested in
14 that before we have the motion or not.

15 THE COURT: Yeah, I do. But one other
16 question, if you may.

17 What is the government's position -- I've
18 never looked at this -- on whether there can be
19 collateral estoppel used at the FCC? In other words,
20 it is -- if they were to prevail, that it is not
21 anticompetitive?

22 MR. WAYLAND: I'm not prepared to address
23 it. It's our view, but I don't have case authority,
24 that it does not have that effect.

25 THE COURT: I would like to know because,

1 it's really -- the number of hypotheticals that the
2 two defendants are operating on are so enormous. I
3 don't find that courts should have to operate in such
4 a world of hypotheticals. But I also agree completely
5 with Mr. Hansen that there's a suit here.

6 MR. WAYLAND: Well, there's a suit because
7 there was a prospect of a real transaction. Once
8 that's not gone -- a good hypothetical, Your Honor,
9 suppose that they had filed their transaction in
10 March, as they did, and that they had gone through the
11 Hart-Scott-Rodino clearance process but they hadn't
12 filed with the FCC, which is really what's their
13 position.

14 We would have said this: We would have
15 said, thank you very much, come back when you file
16 with the FCC and we'll tell you what we're gonna do.
17 We wouldn't have filed a complaint in August.

18 THE COURT: Because you knew you had six
19 months?

20 MR. WAYLAND: Yeah. It was not a real
21 transaction until they filed with the FCC.

22 THE COURT: Is that six-month rule, would
23 that have any applicability here if they were to
24 refile? They seem to think not.

25 MR. WAYLAND: Yes.

1 THE COURT: I think --

2 MR. WAYLAND: Here's what the general
3 counsel of the FCC said when they announced that they
4 were allowing them to withdraw: They said, they are
5 back to "square one." That's the quote, "square one."
6 The clock starts again.

7 THE COURT: But do you think you can invite
8 the general counsel to appear?

9 MR. WAYLAND: I can invite, Your Honor. I
10 can't force.

11 THE COURT: Well, I would like him to, so
12 tell him. I think it's fair to say that some of
13 these -- are they back to square one under the rules?
14 I don't have the ability to know their practices
15 without somebody appearing to say so.

16 I mean, there are a lot of people professing
17 to say what they would do and not do. And whether or
18 not we have a real controversy, it depends a whole lot
19 on what's available to the parties, meaning ATT and
20 T-Mobile.

21 And I need you, as part of your pleading, to
22 address this issue. And it's one of the questions the
23 general counsel may have something to say. I don't
24 know the answer of whether or not they could go from
25 here and convince them because I can hopefully write a

1 persuasive opinion in their favor, which that's a
2 hypothetical, too, at this point.

3 MR. WAYLAND: Right.

4 THE COURT: And on discovery? I'm sorry.

5 MR. WAYLAND: Your Honor, I can give a quick
6 summary where we are on discovery. There are about
7 125 third parties were subpoenaed.

8 THE COURT: 135?

9 MR. WAYLAND: 125 were subpoenaed. There
10 have been productions from 100 of those. There have
11 been seventeen depositions taken, and the parties have
12 identified twenty experts.

13 What's still to be done, supposedly by
14 January 10th, Your Honor, there are potentially
15 forty-six depositions left to complete of the thirty
16 per side that were authorized.

17 THE COURT: So you have twenty or so, and
18 they have twenty or so?

19 MR. WAYLAND: Plaintiffs have twenty-one,
20 and defendants have twenty-five.

21 THE COURT: Have they noticed twenty-five?

22 MR. WAYLAND: Ten have been noticed by us
23 and twelve have been noticed by the defendants. And
24 at least thirty third parties haven't finished their
25 production yet.

1 By January 25th, which is when all the
2 expert depositions are complete, we're gonna have to
3 have had as many as twenty-five expert reports and
4 twenty-five expert depositions.

5 THE COURT: You think I'm gonna hear from
6 twenty-five experts in my little trial?

7 MR. WAYLAND: I don't think so, Your Honor,
8 but --

9 THE COURT: I mean, you've got to be
10 serious. Twenty-five experts?

11 MR. WAYLAND: We identified five in our case
12 in chief and the defendants identified nine. And we
13 identified four rebuttal, and they identified two
14 rebuttal.

15 THE COURT: That's twenty. So you've
16 just -- it's not really twenty-five. You only have
17 twenty experts.

18 I've never seen an expert get off the stand
19 in less than a day or two. I mean, that's -- there's
20 a trial. We have to move fast.

21 MR. WAYLAND: I agree, Your Honor. There
22 would be seventy more depositions, supposedly, to be
23 done before January 10th.

24 THE COURT: No. Seventy more with or
25 without experts?

1 MR. WAYLAND: With experts.

2 THE COURT: But they are not due by the
3 10th.

4 MR. WAYLAND: No. You are right, Your
5 Honor. It could be as many as forty-six before
6 January 10th. And then Your Honor's generally aware
7 of the rest of the schedule.

8 THE COURT: By the 10th. And then the last
9 day for depositions is the 25th. And then we are
10 going to have briefing. And we are going to discuss
11 that at some other time. We don't need to take page
12 limits on exhibits and the briefs.

13 MR. WAYLAND: Right.

14 THE COURT: You are saying forty-six before
15 the 10th and then the experts, which sound to me like
16 twenty.

17 MR. WAYLAND: Well, yeah. I think maybe
18 twenty.

19 THE COURT: Fifteen days with twenty
20 experts.

21 MR. WAYLAND: I think that's right.

22 THE COURT: Quickly, Mr. Hansen, do you
23 disagree with that? That's forty-six depositions
24 between now and the 10th, and twenty depositions
25 thereafter by the 25th; which will be about sixty-six

1 depositions, and you've taken seventeen?

2 MR. HANSEN: I agree that there are a
3 number noticed. I'm not sure what the actual number
4 will turn out to be, how many will actually get taken.
5 The experts may or may not wind up staying through the
6 process. This is designation stage. There's a
7 winnowing process.

8 But what I agree with is we have a certain
9 number of depositions we're going to take. So far
10 we've made progress. I don't anticipate any issues.
11 There are a lot of people working on it at DOJ, a lot
12 of people working on it on our side. We are going to
13 get it all done on schedule.

14 THE COURT: Okay. I don't think DOJ is
15 quite so -- are there any other issues that I have to
16 understand? I find that I'm learning more from the
17 press than I learn from the parties sometimes.

18 MR. WAYLAND: We'll brief this fully, Your
19 Honor, by Tuesday.

20 THE COURT: Tuesday, noon.

21 MR. WAYLAND: Yes.

22 THE COURT: As part of that, I would like to
23 know what effect the ruling in this court would have.

24 Second of all, you probably have had
25 experience with this. Say they lose, what's gonna

1 make the Court of Appeals come to grips with this in
2 the summer? I mean, they generally leave in June. I
3 don't quite understand that they could have -- they'll
4 do something for a TRO or a PI, but I'm unaware that
5 they'll bring in a special -- maybe they do. Maybe
6 that's been your experience. I don't know.

7 MR. WAYLAND: My experience, Your Honor, the
8 parties typically renegotiate the terms of their
9 contract.

10 For example, this contract required the
11 parties to make a filing with the FCC within thirty
12 days of signing up the agreement. So in my view
13 they've either had to renegotiate that or ignore the
14 fact that they are, technically, in breach of that
15 requirement.

16 THE COURT: You say "technically," because
17 they made the filing and took it away. I don't know.
18 That's their problems, not ours.

19 MR. WAYLAND: I agree.

20 THE COURT: I have not read it.

21 Mr. Sunshine, can I ask you a couple of
22 questions here? There are a lot of things lingering.

23 Do you know any law on this, on whether or
24 not a ruling from this court on title -- on section --
25 I keep calling it Title VII, sorry -- Section 7, what

1 effect it would have on the FCC?

2 MR. SUNSHINE: Your Honor, I know generally.
3 I don't have cases to cite you, but I can provide
4 those to you in short order. But the general rule is
5 as Your Honor correctly stated; the FCC has to approve
6 a transaction that's in the public interest.

7 The public interest includes many things,
8 including competition. And, importantly, one key
9 difference between the FCC proceeding and your court,
10 Your Honor, is in front of the FCC AT&T has the burden
11 of proving that the application is, indeed, in the
12 public interest.

13 THE COURT: What's that burden? Is it --

14 MR. SUNSHINE: I'm not sure, Your Honor. I
15 don't know if it's a preponderance of evidence or
16 convincing. I do know it is the FCC's -- it is the
17 moving party's burden to show.

18 THE COURT: That may have an effect on res
19 judicata and collateral estoppel, itself.

20 MR. SUNSHINE: And for all those reasons,
21 Your Honor, I do not believe it's collateral estoppel.
22 I believe the FCC will take note, just as they took
23 note of the DOJ's opinion and considered it persuasive
24 authority wherever you come out. But I do not believe
25 it's collateral estoppel.

1 THE COURT: And do you believe that their
2 report is admissible in this court, or you don't want
3 to express an opinion on that?

4 MR. SUNSHINE: Right now, it's -- I think
5 the report should be admissible in this court. But
6 it's just -- it's a staff report, so it's not a
7 binding order of the commission. But I would say, the
8 much more important part -- because I think this just
9 underscores the element of fantasy that you heard
10 earlier this morning -- is that that report didn't
11 come out of full cloth or come out of thin air. That
12 report was a result of an eight-month investigation.

13 According to the reports, AT&T met with the
14 FCC staff and commissioners on at least thirty
15 occasions -- if I'm getting that fact right --
16 committed voluminous amounts of documents. Party
17 after party appeared in front of the FCC and put in
18 their opinions.

19 THE COURT: Okay.

20 MR. SUNSHINE: So the reason why I raised
21 that, Your Honor, is that this idea of just going back
22 to the FCC and getting clearance, it's just fantasy,
23 Your Honor.

24 THE COURT: They don't view me as an expert
25 in the federal communications, and I don't view them

1 as an expert, necessarily, in antitrust. But that
2 doesn't mean that they're gonna be bound in some
3 fashion by me unless it's legally required.

4 Well, I have to go back to you on something
5 you did say earlier. And Mr. Hansen is absolutely
6 right. You said if you lose here, that's the end of
7 the case -- I mean, if the Justice Department loses.
8 If they win, you win.

9 MR. SUNSHINE: Well, Your Honor, I think
10 that that's right. Let me explain.

11 THE COURT: You said, "If we lose that day,
12 I think we're going to be essentially done." I'm
13 quoting.

14 MR. SUNSHINE: I'm nothing if not
15 consistent, Your Honor. Let me explain exactly what I
16 mean. Because I think Your Honor hit the nail on the
17 head earlier.

18 We have a Section 7 case to prove that is
19 the same Section 7 case that the DOJ approves. We
20 have the additional burden of standing.

21 If Your Honor decides the Section 7 case on
22 the basis of the DOJ case, when I said we're
23 essentially done, that -- what I meant by that is you
24 will have decided the issues as an all practical
25 effect.

1 I don't think we're technically bound as a
2 matter of collateral estoppel by those decisions
3 because we are not present. But you would have
4 examined the whole record, you would have made the
5 decision. And that's why the right answer, from an
6 efficiency perspective, is to do this once.

7 Now, I think AT&T is trying to get everybody
8 to turn into pretzels to really satisfy the mess that
9 they've made for themselves, for the -- of the
10 contractual obligations they've put in. And they've
11 really cynically manipulated the process with eight
12 months of FCC, withdrawing the application, and now
13 coming before you for an advisory opinion.

14 I certainly support the DOJ's approach of
15 now this isn't ripe. What AT&T should do, if they are
16 so convinced they are going to get this through the
17 FCC, file a new application. Tell us what transaction
18 you're doing. Tell us when you're going to do that.
19 And then in that case Your Honor can set an
20 appropriate schedule. It won't be an advisory
21 opinion, and we can do this once.

22 We don't need to prove the Section 7 case
23 once for DOJ, once for Sprint, once for Cellular South
24 because it's the same record, same evidence.

25 THE COURT: Could you refresh my

1 recollection? On the Section 7 materials that we
2 allowed DOJ to share, I believe, essentially, with you
3 folks --

4 MR. SUNSHINE: That's right.

5 THE COURT: -- what are you missing now that
6 that's happened?

7 MR. SUNSHINE: Well, those materials --

8 THE COURT: Let's just focus on Section 7.

9 MR. SUNSHINE: Right. Those materials, Your
10 Honor, were the materials related to the economic
11 models that AT&T has put in with respect to its
12 affirmative defenses. And so those models go to what
13 are the engineering models, how much are prices
14 generally going to go up as a result of the merger.
15 Those kinds of questions.

16 They don't deal with market definition.
17 They don't deal with some of those other kinds of
18 questions.

19 So it's an important part of the case, Your
20 Honor, but there's certainly lots of other elements.

21 THE COURT: Well, relative to what?

22 MR. SUNSHINE: Relative to the Section 7
23 analysis. We just briefly -- Section 7 analysis
24 requires product market definition.

25 THE COURT: Yeah, but the Justice Department

1 is going to do that. You'll end up shadowing around
2 with them anyways. I mean, I need to be practical.

3 Here's my thought, sir. At the moment, we
4 have a lot of things in flux. What I would like to
5 do -- I have made my ruling that they have to show in
6 the private case. You've litigated this really more
7 than once. And I agree with the position of Sprint
8 and Cellular South that they have to show both the
9 Section 7. And at least at the moment I believe that
10 if it happens that they win, the government and you
11 have to proceed, that you should be getting discovery
12 on your other -- your standing issues. There is going
13 to be precious little that won't be done by the
14 Justice Department under the procedures that we have.

15 So that I would like you to come up with a
16 discovery schedule that allows them -- they're going
17 forward, but we're going to limit it to the two issues
18 that establish standing. There are two for Cellular
19 South and one for Sprint.

20 And that I will commit to make sure we don't
21 have to unscramble the eggs. We'll have to go by a PI
22 if necessary. But if the Justice Department wins, it
23 may be over anyways -- well, if they win, it is over,
24 and I suspect you are not going to do the Section 7.

25 So I would think that if -- there really

1 isn't much that we have to worry about. I mean, I
2 can't -- I'm having trouble with the practicalities
3 here other than you would like to be a full
4 participant in the Section 7.

5 We would have to slow things down. And
6 until I rule on the government's motion, I can't
7 decide that.

8 MR. SUNSHINE: Well, Your Honor, with one
9 amendment to that, I think we're on the same -- you
10 know, we're clearly on the same time frame.

11 We do have a private right of action under
12 Section 16. Now, worst case scenario -- and I think
13 the chances of this may be the same as comet hitting
14 the earth, but suppose DOJ were to settle the case
15 with AT&T; we would still have our case.

16 And so the proposal that we had made to you
17 in the CMO would be to get, you know, basically
18 discovery of the record without any interference.

19 So basically all we're asking is to burn
20 copies of the hard drives. And that way, Your Honor,
21 if we have to put on a case, if we have to go to a PI,
22 we're ready. And there's no burden, so there's really
23 no reason not to do that.

24 THE COURT: How big is that burn?

25 MR. SUNSHINE: I believe, Your Honor, since

1 it's materials that have already been produced in the
2 litigation, they've already been harvested, processed,
3 priv logged, reviewed.

4 THE COURT: Produced by AT&T, not third
5 parties.

6 MR. SUNSHINE: Our proposal, Your Honor,
7 leaves third parties out of the equation. It just
8 says defendants will produce all of their materials.
9 And that leaves us on a position to move quickly on a
10 PI if we need to.

11 THE COURT: Have you produced everything
12 that they want?

13 MR. SUNSHINE: Yes, we have, Your Honor.

14 THE COURT: It is done?

15 MR. SUNSHINE: It is done.

16 THE COURT: So the notion would be that they
17 produce what they produced to the Department of
18 Justice that you don't already have? I mean, you have
19 certain things coming to you from the Department Of
20 justice, and there's no point getting it twice.

21 MR. SUNSHINE: That's a small portion of the
22 total record, Your Honor. But, yes, we have that
23 piece of it.

24 THE COURT: I'm sorry, just to make sure I
25 understand. If you got what they have given to the

1 Department of Justice both during the investigatory
2 stage -- and I don't know if there's anything been
3 given since.

4 MR. SUNSHINE: There has been quite a bit,
5 as I understand it.

6 THE COURT: You are looking for AT&T,
7 T-Mobile's production to the government. And then
8 you're willing to, for lack of a better word, be quiet
9 for a while?

10 MR. SUNSHINE: Correct. As quiet as I can
11 be.

12 THE COURT: And you can work out -- I've
13 made the key ruling, I think, for the protective
14 order. But you can work out the details of the
15 protective order and the referral.

16 It appears that everyone seems to agree to a
17 referral to the special master who's been unbelievably
18 critical to this case moving. I can't thank him
19 enough. We would be wallowing if we didn't have him
20 to make decisions sometimes in the middle of the
21 night.

22 Okay. Well, I'll hear from Mr. Hansen on
23 that.

24 But those two things, the remainder of the
25 protective order, if you could just get a referral.

1 And he would ask the parties, the special
2 master, and I will ask on his behalf whether the
3 declaration needs to be completed?

4 Is that fair, Richard, whether you would
5 expect his prior declarations so that we can get a
6 referral done?

7 MR. SUNSHINE: I haven't looked at it, Your
8 Honor, but I can't imagine that we would not be
9 willing to accept it.

10 THE COURT: So we can get the thing moving.

11 So your hypothetical, which is like some of
12 the other hypotheticals that would cause us the
13 heartburn is if there's a settlement, which you can't
14 stop for some reason, then you'd want to go through
15 with your suit. And you have to go quickly because we
16 are still dealing with the September 20 deadline.
17 And, of course, AT&T wants, to be fair, to get that
18 done sooner than later.

19 But if the government files and the case
20 gets withdrawn, where do you stand on that?

21 MR. SUNSHINE: We believe that we're in the
22 same position. We don't know what transaction is
23 going to -- is to eventually be proposed. We don't
24 need to prosecute our case if their case is in limbo.

25 THE COURT: So yours get stayed or withdrawn

1 without prejudice according to you as well?

2 MR. SUNSHINE: I'd have to discuss that with
3 my client, but that's a sensible position.

4 THE COURT: You go up and down with them.

5 Okay. I think we are down to one issue now,
6 Mr. Hansen.

7 We have a briefing schedule. Tuesday they
8 come -- let's see, by noon the government is filing
9 whatever they're gonna file regarding the schedule of
10 this matter.

11 In the meantime, the Court is not stopping
12 anything. I haven't ruled, so therefore you
13 proceed -- I'm sorry, Mr. Wayland, could you stand
14 that way so I can see him?

15 MR. WAYLAND: Yes, I understand we are
16 proceeding along until you rule.

17 THE COURT: Right, until I rule.

18 MR. WAYLAND: Exactly.

19 THE COURT: Tuesday puts you at the 13th by
20 noon. ATT is going to have to file by Wednesday, the
21 close of the day.

22 We can have a hearing on Thursday or Friday.
23 It looks to me like it has to be in the afternoon in
24 both instances. Is there any strong opposition?

25 MR. WAYLAND: Thursday works better for my

1 schedule, Your Honor.

2 MR. HANSEN: Whatever is most convenient
3 form the Court, Your Honor. We can do any day.

4 THE COURT: 2:30?

5 MR. WAYLAND: On Thursday, Your Honor?

6 THE COURT: 15th.

7 MR. HANSEN: Thank you.

8 THE COURT: We'll have a hearing on whatever
9 motion we have. I don't think at this point in time I
10 need anything further from Sprint. Other than if
11 anybody wants to give me any law on this collateral
12 estoppel, I'd like to know.

13 We're moving rather quickly, so Mr. Sunshine
14 wants to do a memorandum of law on the issue. Because
15 your premise has been that there's some collateral
16 estoppel effect from my ruling as to certain issues, I
17 understand that. But -- okay.

18 On his issue. He's concerned --
19 Mr. Sunshine is concerned that nobody knows what the
20 deal is. You say it is as it is. Well, he objects to
21 it as is, and he wants his day in court for his client
22 in the event another hypothetical happens. Everybody
23 wants our time and attention in the event there are a
24 bunch of hypotheticals.

25 What's your response? If it's hypothetical,

1 I would be careful.

2 MR. HANSEN: Your Honor, I'm not going to go
3 back and plow old ground. As to his hypothetical, we
4 don't think that this is an occasion to unleash the
5 eight million pages that's been released to the
6 government. In the event something comes to pass, his
7 hypothetical, certainly there could be an adjustment
8 to that. We don't honestly think we ought to redo
9 that issue and suddenly open the floodgates to --

10 THE COURT: It's not a redo. We are here
11 now. I've got to rule. There's still standing on
12 their case. It's not a redo at all.

13 I said they weren't going to be part of your
14 government case, but they want to be in the position
15 to litigate and then move for a PI if the government,
16 in some fashion, goes away and you still proceed. And
17 unless the deal changes, of course, then they would
18 have to change the complaint.

19 I don't see -- other than you need a
20 confidentiality order, and, again, our special master
21 can help with that. They are not looking for third
22 parties. They are not imposing upon anybody who isn't
23 a party. And it's their position that they have a
24 suit that's alive and well.

25 I don't -- what's the next thing, other than

1 you have to burn some CDs?

2 MR. HANSEN: Eight million pages,
3 obviously -- we're talking about a serious competitor,
4 turning over all kinds of AT&T documents. We don't
5 think they need all of them. They haven't even framed
6 a discovery request.

7 THE COURT: They want what you gave to the
8 Department of Justice because they say Section 7 -- if
9 I say that their claims include Section 7, they'll
10 have to prove what the government does, and in
11 addition they have the standing issues as to roaming
12 and handsets. You think that you really want to take
13 up the time of the special master going through eight
14 million documents to say, well, this really isn't
15 relevant to the government's case?

16 That's really what they are saying. They
17 are saying, we stand in the shoes of government plus
18 some.

19 MR. HANSEN: Your Honor, you said it best.
20 They can count on the government to deal with those
21 issues. We don't think they need to back step the
22 government on all those points.

23 THE COURT: Well, they only do if the
24 government, for some reason, drops out of the picture.

25 MR. HANSEN: Then the issue can be addressed

1 at that time. There are all kinds of issues turning
2 over eight million pages of our corporate documents to
3 Sprint on that hypothetical.

4 If that comes to pass, then that could be
5 adjusted at that time. We don't think now is the time
6 to take that step.

7 THE COURT: Would you agree they would be
8 entitled to have a PI hearing immediately if, in fact,
9 they get -- are in the position -- they don't -- I
10 don't see why we should say to them, well, you wait
11 until after the 20th of September. I mean, why should
12 they have to wait? If I have to move fast for you, I
13 can move fast for them, too.

14 MR. HANSEN: On the hypotheticals, Your
15 Honor, they obviously have tools available to them to
16 try and advance the issue. I think it's -- obviously,
17 it's obviously a step by step. At the appropriate
18 time they do that, they would be entitled to certain
19 things. They are not entitled where they are sitting
20 now as a private litigant to essentially get
21 everything that the Department of Justice has gotten
22 from us.

23 We think based on a hypothetical, that's not
24 appropriate. That is a big burden. It is --
25 confidentiality issues are important. Sprint is a

1 large competitor. This is sensitive stuff. We
2 honestly think that's not an appropriate step here.

3 If the time comes when it is appropriate,
4 the Court and special master will make sure they get
5 their rights protected. But giving them all that
6 stuff right now on a hypothetical, we think --

7 THE COURT: Well, some of the stuff they
8 already have. But we don't know what proportion of
9 that you have.

10 MR. HANSEN: Some they have. They can frame
11 more limited responses in the litigation to things not
12 relevant to the government's case.

13 THE COURT: Well, I think the easiest thing,
14 sir, before we get back here, I would like you to
15 list, generic, what isn't relevant to their case so we
16 know. You know what the stuff is. They want all that
17 you have given to the Justice Department. If there
18 are significant things, let's find out what they are,
19 and then we'll know what the special master has to do
20 instead of putting the burden on them.

21 MR. HANSEN: Yes, Your Honor.

22 MR. SUNSHINE: Your Honor, if I may make two
23 quick points?

24 First of all, this idea that --

25 THE COURT: Could you come to the mic. I'm

1 sorry.

2 MR. SUNSHINE: This idea that one
3 hypothetical transaction should slow us down when what
4 they're asking Your Honor to do is issue an advisory
5 opinion on the basis of multiple hypotheticals is
6 really rich.

7 THE COURT: That hasn't been lost on anyone,
8 sir. It's an obvious point.

9 MR. SUNSHINE: The second point, which I
10 think is equally rich, although on a smaller way, is
11 for Mr. Hansen to be complaining about concerns of
12 giving documents to a competitor when they're sitting
13 on millions of pages of Sprint's documents today.

14 And the third point is Mr. Hansen is really
15 trying to wish away our right granted by Congress.
16 I'm sure he wishes Congress didn't grant us a private
17 right of action, but they did. We have one. We have
18 an active case. They need to turn over the stuff.
19 There's no burden to it.

20 THE COURT: All right. Where we stand now,
21 Mr. Sunshine, is by Tuesday the ATT, at noon, will
22 tell us what of the universe they feel is strongly not
23 related to a Section 7 case, and/or your standing
24 issues of their production to the government.

25 And they are gonna tell us what things

1 that -- there may be a category of things that they
2 think are protected in some fashion, so we know what
3 we have because that will move us along.

4 I don't expect you to come up with, you
5 know -- let's assume the government asks them for
6 materials that are related to their Section 7 case. I
7 don't know what else they were doing, but if they have
8 something else up their sleeves, let's find out. Then
9 we'll know what the fights are about.

10 I don't find the burden argument
11 particularly persuasive. And if you'll stay out of
12 everybody's hair in the meantime, then, frankly,
13 that's a small price to pay.

14 MR. SUNSHINE: Thank you, Your Honor.

15 THE COURT: I would ask that the Sprint and
16 Cellular South -- is there anything that Cellular
17 South wants to add or subtract here?

18 One minute, please.

19 (Pause.)

20 THE COURT: I have a special request from
21 the special master. Anything he wants, goes. He
22 wants the parties to remain so he can discuss
23 scheduling issues, if you don't mind.

24 You are including private parties as well as
25 government?

1 SPECIAL MASTER LEVIE: Yes. ATT and
2 Cellular South also -- Sprint. I'm sorry.

3 THE COURT: I'll make the jury room
4 available for you?

5 SPECIAL MASTER LEVIE: I can do it right
6 here.

7 THE COURT: I don't know about that.

8 MR. McBRIDE: Answering the Court's inquiry,
9 Your Honor. Charles McBride on behalf of Cellular
10 South. Your Honor, we agree with everything
11 Mr. Sunshine has said and adopt the same positions as
12 Sprint on all these matters today.

13 THE COURT: All right. You have one other
14 legal issue than folks out here. But to the extent
15 that it makes anything easier, I have ruled on the
16 legal dispute between the ATT and Cellular South,
17 Sprint about the scope of discovery.

18 That doesn't mean that what they are trying
19 to protect won't be protected to some extent on
20 relevance grounds or confidentiality. But I do not
21 believe that the plaintiffs here are precluded from
22 looking into the question of -- or having to prove
23 they have a burden of showing a Section 7 violation.

24 And, if, once again, on a hypothetical, if
25 we lose the government in the middle of this for some

1 unknown and unpredictable reason, they will be stuck
2 proving both the Section 7 -- the private parties will
3 be stuck proving the Section 7 violation as well as
4 standing.

5 So I'm not foreclosing the idea of agreeing
6 to the discovery that Sprint has asked for, but I'm
7 giving them -- the defendants here, ATT and
8 T-Mobile -- an opportunity to explain what's either
9 not relevant -- listing by generics. I'm not
10 expecting you to go document by document, what's not
11 relevant or what shouldn't be provided to the other
12 side for some specific reason, but the legal reason is
13 now off the table.

14 MR. KELLOGG: Your Honor, may we be
15 permitted to brief the issue of just what Section 7
16 violation they have to prove? Because I think it is
17 common ground that they have to prove a Section 7
18 violation. But the Court has ruled that the DOJ
19 argument that the consolidation of these two companies
20 will impede competition in mobile wireless services,
21 thereby hurting consumers of those services, that they
22 do not have standing to raise that claim.

23 THE COURT: They can't recover for that
24 claim. I don't think I have ruled.

25 Yeah, you can brief it, and they can respond

1 by Tuesday. But I also want the list because I think
2 it's quite clear -- and I don't want to cut you off,
3 but there was a lot of briefing that went on
4 previously as part of this pretrial about this.

5 And I certainly -- as part of my opinion, I
6 assumed that that wasn't before me, that issue. I
7 just went on from there. I think the law is pretty
8 clear on the Supreme Court precedent.

9 But you are welcome to address it, and
10 Mr. Sunshine can respond. We are on a schedule that
11 now you have to tell us what shouldn't be produced
12 based on my ruling, tentative ruling. You can tell me
13 why the ruling is wrong first, and then tell me what
14 shouldn't be produced either because of relevance or
15 because -- you have to assume I'll rule as I've ruled.

16 MR. KELLOGG: Thank you, Your Honor.

17 THE COURT: That would be Tuesday by noon,
18 and you'll have until Wednesday by the end of business
19 to respond to that.

20 The government will file their motion by
21 Tuesday, noon, and ATT has until the end of business
22 on Wednesday. We will be back Thursday at 2:30 for a
23 hearing.

24 I don't know that there's any other issues
25 that need to be resolved. We have our days for our

1 tutorial at the moment.

2 MR. McBRIDE: Your Honor, may I?

3 THE COURT: Mm-hmm.

4 MR. McBRIDE: Just for clarification. I
5 think the Court's referred to Sprint's discovery
6 request. Throughout this discussion, obviously, we
7 would ask that Cellular South be included in that, and
8 then add to that that Sprint's lawyers also should be
9 given -- or we would request that they be given access
10 to the roaming materials as well as the devices, even
11 though roaming is not an issue for Cellular South.

12 THE COURT: I'm not sure where your access
13 to materials -- sitting where? I thought we were just
14 talking about what ATT produced to the government
15 either as part of the investigation or recently.

16 MR. McBRIDE: That's correct, Your Honor.

17 THE COURT: Nothing would be excluded.

18 MR. McBRIDE: I'm anticipating what AT&T
19 might or might not say. That, number one, that
20 Cellular South would have the same access to those
21 materials as does Sprint.

22 THE COURT: Yeah. I mean, I understood that
23 they were on your behalf.

24 And if the parties would kindly -- we will
25 close the courtroom now.

Do you want to talk in the jury room? I think that makes the most sense.

Is there anything further? We have our next hearing. But in the meantime, all discovery will go forward. We will not stay anything until the Court rules next Thursday. So I ask you to proceed.

Thank you very much.

MR. HANSEN: Thank you, Your Honor.

MR. WAYLAND: Thank you, Your Honor.

MR. SUNSHINE: Thank you, Your Honor.

(Whereupon, at 11:03 a.m. the proceedings concluded.)

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REPORTER'S CERTIFICATE

I, Chantal M. Geneus, a Certified Realtime Reporter and Registered Professional Reporter of the United States District Court for the District of Columbia, do hereby certify that I stenographically reported the proceedings in the matter of CA 11-1560, USA versus AT&T, et al., CA 11-1600, Sprint Nextel versus AT&T, et al., and CA 11-1690, Cellular South, et al. versus AT&T, et al, on Friday, December 9, 2011, in the United States District Court for the District of Columbia, before the Honorable Ellen S. Huvelle, United States District Judge.

I further certify that the page numbers 1 through 87 constitute the official transcript of the proceedings as transcribed by me from my stenographic notes to the within typewritten matter.

In witness whereof, I have affixed my signature this 10th of December, 2011.

/s/ Chantal M. Geneus
Chantal M. Geneus, RPR, CRR
Official Court Reporter